IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID STEVEN SANCHEZ RAMOS, Appellant.	No. 37827-2-II Consolidated with No. 38928-2-II, Dismissed UNPUBLISHED OPINION

Van Deren, C.J. — After negotiating a plea agreement and entering guilty pleas for first degree murder, first degree robbery, both with firearm enhancements, and first degree rendering criminal assistance, David Sanchez Ramos appeals, arguing that his convictions for murder and rendering criminal assistance violated double jeopardy. We affirm, based on insufficient evidence in the record to resolve his double jeopardy claim.

FACTS

On the night of July 19, 2005, Sanchez Ramos, Joshua Owen, and several fellow

members of the "Spanaway Crips" gang were at a local park.[1] Clerk's Papers (CP) at 5. At approximately 1:00 am the next morning, four other young men, including: Clifton Nelson, Kenneth Palmer, Robert Swesey, and Derrick Johnson arrived at the park looking for a party that they believed was nearby. Sanchez Ramos and his associates confronted them. After an argument, several gang members drew handguns.

Gang members ordered the newcomers to empty their pockets, take off their clothes, and lie on the ground. Gang members then attacked and beat them. Owen severely beat Nelson with a firearm on the back of his head and caused deep lacerations that caused Nelson to lose significant amounts of blood.

After "pistol whipping" Nelson, Owen gave his gun to Sanchez Ramos and told him to shoot anyone who tried to escape. CP at 5. Owen then began picking through the victims' belongings. When Nelson stood and attempted to run away, Sanchez Ramos shot him in the left shoulder blade, the back of his left arm, and the back of his right leg. Nelson died; the medical examiner concluded that his death was caused by gunshot wounds and lacerations to his head. Sanchez Ramos disposed of the firearm.

The State charged Sanchez Ramos with one count of aggravated first degree murder, one count of first degree murder, four counts of first degree robbery, and three counts of second degree assault. Sanchez Ramos negotiated a plea. The State filed an amended information

[1] Most of the underlying facts come from the State's declaration for determination of probable cause and a supplemental declaration. But in his plea, Sanchez Ramos provided a short written statement instead of checking a box "agree[ing] that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea." Clerk's Papers (CP) at 25. Even so, "the court is not limited to the defendant's admissions. In determining factual basis, it may rely on any reliable source, as long as the source is made part of the record." *State v. Amos*, 147 Wn. App. 217, 228, 195 P.3d 564 (2008).

reducing the charges to one count each of first degree murder, first degree robbery, and first degree rendering criminal assistance. In his written statement on plea of guilty to the amended information, Sanchez Ramos admitted the following:

> On July 20, 2005, I unlawfully and with premeditated intent did shoot and kill Clifton Nelson with a firearm in Pierce Co. WA. On that date I was an accomplice in the theft of personal property belonging to Kenneth Palmer, Robert Swesey and Derrick Johnson with the use of force and being armed with a firearm, in Pierce Co. WA. On that same date, I rendered criminal assistance to another who commit[t]ed the crime of murder in the first degree by disposing of a firearm which would have aided in the apprehension of that person, in Pierce Co. WA.

CP at 25. In consideration for the reduction in charges, Sanchez Ramos also stipulated that his offenses were not the same criminal conduct and did not merge for sentencing purposes.[2] He waived his right to appeal a standard range sentence based on his stipulated criminal history and offender score.

At the plea hearing, the trial court spoke with Sanchez Ramos about his waiver of rights and the consequences of his guilty pleas. From this colloquy, the trial court found that Sanchez Ramos's pleas were knowing, intentional, and voluntary and that the charges had a factual basis. The trial court imposed a sentence totaling 481 months of confinement, plus restitution and costs.

Sanchez Ramos appeals.

---

[2] Sanchez Ramos did not also waive his right to appeal based on double jeopardy because

> [a] double jeopardy violation claim is distinct from a "same criminal conduct" claim and requires a separate analysis. The double jeopardy violation focuses on the allowable unit of prosecution and involves the charging and trial stages. The "same criminal conduct" claim involves the sentencing phase and focuses instead on the defendant's criminal intent, whether the crimes were committed at the same time and at the same place, and whether they involved the same victim.

State v. French, 157 Wn.2d 593, 611-12, 141 P.3d 54 (2006).

ANALYSIS

Double Jeopardy

Sanchez Ramos argues that his convictions for first degree murder and first degree rendering criminal assistance violate double jeopardy because he rendered criminal assistance to a codefendant accomplice who also caused Nelson's death—that is, they both committed first degree murder of the *same victim*. The State maintains that Sanchez Ramos waived his right to this challenge by pleading guilty, citing our decision in *State v. Amos*, 147 Wn. App. 217, 195 P.3d 564 (2008). Because our Supreme Court recently abrogated *Amos* on these grounds sub silentio in *State v. Hughes*, 166 Wn.2d 675, 681 n.5, 212 P.3d 558 (2009), we reach the merits of the challenge. But the record contains insufficient evidence of the specific criminal acts to which Sanchez Ramos and Owen pleaded and insufficient evidence to determine whether Sanchez Ramos's convictions violate double jeopardy.

A. Standard of Review

"Claims of double jeopardy are questions of law, which we review de novo." *Hughes*, 166 Wn.2d at 681.

B. Challenge Not Waived by Guilty Plea

In *State v. Knight*, our Supreme Court held that a defendant can appeal on double jeopardy grounds his convictions entered pursuant to a guilty plea because the claim goes to "'the very power of the State to bring the defendant into court to answer the charge brought against him.'" 162 Wn.2d 806, 811, 174 P.3d 1167 (2008) (quoting *Blackledge v. Perry*, 417 U.S. 21, 30, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974)). The court distinguished double jeopardy from other constitutional protections that a defendant waives by pleading guilty, such as a right to a

jury trial and the right to be free from self-incrimination. *Knight*, 162 Wn.2d at 811.

In *Amos*, our court distinguished *Knight*'s ruling as applicable only to "unit of prosecution" double jeopardy claims and not Amos's "same offense" double jeopardy claim. 147 Wn. App. at 226-27. Characterizing *Knight* as a "narrow exception" to the general prohibition against challenging guilty pleas, we reasoned that the State had power to charge Amos with both counts, "even if those charges arose from the same offense." *Amos*, 147 Wn. App. at 227. We concluded that "[a] claim that *potential* trial evidence never presented because the defendant pleaded guilty would have been constitutionally insufficient is, therefore, irrelevant and the guilty plea precludes it." *Amos*, 147 Wn. App. at 228.

In *State v. Martin*, 149 Wn. App. 689, 696, 205 P.3d 931 (2009), Division One disagreed with the *Amos* court's characterization of *Knight* as applicable only to "unit of prosecution" double jeopardy claims. The *Martin* court concluded, instead, that *Knight* broadly prohibited the waiver of double jeopardy claims after indivisible guilty pleas. 149 Wn. App. at 696. First, the court found that "[n]othing in the [*Knight*] court's analysis was premised upon what double jeopardy theory was invoked." *Martin*, 149 Wn. App. at 696. Second, "under the general rule that a plea waives appeal even of constitutional violations occurring *before* the plea (unless related to the plea itself or to the power of the government to prosecute), a double jeopardy violation occurring only upon conviction, as is claimed here, is not waived." *Martin*, 149 Wn. App. at 696 (footnote omitted). Finally, *Martin* recognized that the "*Knight* court's references to the power of government to prosecute are ringing echoes from celebrated cases—cases which did not explore whether there is a difference, for double jeopardy purposes, between the power to charge and the right to obtain a conviction." 149 Wn. App. at 696-97.

Recently, in *Hughes*, our Supreme Court reviewed a defendant's "same offense" double jeopardy challenge following his guilty plea to second degree child rape and second degree rape based on a "victim's inability to consent by reason of physical helplessness or mental incapacity." 166 Wn.2d at 679. The State conceded that Hughes's guilty plea did not preclude a double jeopardy challenge. *Hughes*, 166 Wn.2d at 681 n.5. As such, our Supreme Court reviewed the issue on the merits, citing *Knight*. *Hughes*, 166 Wn.2d at 681 & n.5. The *Hughes* court "*see also*" cited Division One's *Martin* decision, parenthetically noting that "*Knight* is applicable to theories of double jeopardy other than unit of prosecution theory." 166 Wn.2d at 681 n.5. The *Hughes* court also "*Cf.*" cited our decision in *Amos*. 166 Wn.2d at 681 n.5. In any event, by applying *Knight* to a "same offense" double jeopardy guilty plea appeal—the precise legal issue we face here—our Supreme Court overruled *Amos* sub silentio on that issue. Accordingly, following *Knight* and *Hughes*, we turn now to the merits of this appeal.

C. Insufficient Information in the Record

Under the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution, the State may not punish a defendant multiple times for the same offense. *Hughes*, 166 Wn.2d at 681. "After a guilty plea the double jeopardy violation must be clear from the record presented on appeal, or else be waived. But where a double jeopardy violation is clear from the record, a conviction violates double jeopardy even where the conviction is entered pursuant to a guilty plea." *Knight*, 162 Wn.2d at 811-12 (citation omitted).

To evaluate a double jeopardy challenge, we examine the statutory language to determine if the applicable statutes expressly permit cumulative punishment. *Hughes*, 166 Wn.2d at 681. If the statutes do not authorize multiple punishments for the same act or transaction, we apply the

"same evidence" test. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *Hughes*, 166 Wn.2d at 681-82. Even if the two statutes pass this inquiry, "multiple convictions may not stand if the legislature has otherwise clearly indicated its intent that the same conduct or transaction will not be punished under both statutes." *Hughes*, 166 Wn.2d at 682. Here, the statutes for first degree murder and first degree rendering criminal assistance do not expressly permit punishment for the same conduct. RCW 9A.32.030; RCW 9A.76.070.

Under the "same evidence" test, two statutory offenses are constitutionally the same if they are identical in law and in fact. *Hughes*, 166 Wn.2d at 682. "If each offense includes an element not included in the other, and each requires proof of a fact [that] the other does not, then the offenses are not constitutionally the same under this test." *Hughes*, 166 Wn.2d at 682.

A person commits first degree murder if, with a premeditated intent to cause the death of another person, he causes the death of such person. RCW 9A.32.030(1)(a). A person commits first degree rendering criminal assistance if he "renders criminal assistance to a person who has committed or is being sought for" first degree murder. RCW 9A.76.070(1); *see* 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 120.11, at 483 (3d ed. 2008) (WPIC). A person "renders criminal assistance" if he acts "with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he knows has committed a crime" by "[c]onceal[ing], alter[ing], or destroy[ing] any physical evidence that might aid in the discovery or apprehension of such person."[3] RCW 9A.76.050(5).

[3] Rendering criminal assistance corresponds to the common law notion of an accessory after the fact and, at the common law, "[a] principal . . . may not also become an accessory after the fact by his subsequent acts." 2 Wayne R. LaFave, Substantive Criminal Law § 13.6(a), at 402 (2d ed. 2003); *see* 13A Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 1801, at 366 (2d ed. 1998).

Here, the record does not contain sufficient evidence for us to determine whether the crimes Sanchez Ramos pleaded to—first degree murder and rendering criminal assistance—are identical in fact or require separate proof. Sanchez Ramos argues that these convictions violate double jeopardy because he rendered criminal assistance to a codefendant who was an accomplice to Nelson's murder. Accordingly, Sanchez Ramos argues that, if Owen were an accomplice to Sanchez Ramos's shooting of Nelson, all the evidence used to prove Sanchez Ramos's first degree murder conviction would necessarily be combined with additional evidence to prove he rendered criminal assistance to Owen (as an accomplice to his shooting Nelson), thus violating the "same evidence" test.

But the record is unclear which act or acts killed Nelson and which of the numerous codefendants accepted responsibility for which of those criminal acts.[4] The declaration for determination of probable cause and its supplement in Sanchez Ramos's case state that Owen severely "pistol whipped" the back of Nelson's head. This attack caused extensive lacerations that resulted in significant blood loss. Owen handed the gun to Sanchez Ramos, so he could shoot anyone who tried to escape, and Nelson tried to escape. Sanchez Ramos shot Nelson three times. A blood trail led to Nelson's body. The declaration of probable cause reads: "According to the Associate Medical Examiner the deep lacerations on the victim's head that caused major bleeding also contributed to his death." CP at 6. The supplemental declaration similarly stated: "Nelson collapsed into some nearby bushes where he died from three gunshot wounds to his

[4] Crimes can stem from multiple causes. *See*, *e.g.*, *State v. McDonald*, 90 Wn. App. 604, 613-14, 953 P.2d 470 (1998), *aff'd*, 138 Wn.2d 680, 981 P.2d 443 (1999). In *McDonald*, we upheld the second degree murder conviction of a defendant who shot a person who was already mortally wounded. 90 Wn. App. at 606-07.

body. The Medical Examiner concluded that the major bleeding from Nelson's head wounds also contributed to his death." CP at 13-14.

These facts present multiple scenarios under which Sanchez Ramos, Owen, or others could have accepted responsibility for different criminal acts. *See generally* RCW 9A.08.020; 1 Wayne R. LaFave, Substantive Criminal Law § 6.4 (2d ed. 2003). For example, Sanchez Ramos and Owen could have been coprincipals and culpable for their own acts that independently caused Nelson's death. *See*, *e.g.*, *State v. McDonald*, 90 Wn. App. 604, 613, 953 P.2d 470 (1998), *aff'd*, 138 Wn.2d 680, 981 P.2d 443 (1999); *Cox v. State*, 305 Ark. 244, 248-49, 808 S.W.2d 306 (1991). Or, as Sanchez Ramos argues, he could have been principally liable for the first degree murder based on his shooting Nelson, while Owen or others were guilty as accomplices to Nelson's shooting death.[5] *See* RCW 9A.08.020.

In his written statement on plea of guilty, Sanchez Ramos admitted:

> On July 20, 2005, I unlawfully and with premeditated intent did shoot and kill Clifton Nelson with a firearm in Pierce Co. WA. On that date I was an accomplice in the theft of personal property belonging to Kenneth Palmer, Robert Swesey and Derrick Johnson with the use of force and being armed with a firearm, in Pierce Co. WA. On that same date, I rendered criminal assistance to another who commi[t]ted the crime of murder in the first degree by disposing of a firearm which would have aided in the apprehension of that person, in Pierce Co. WA.

CP at 25. The plea statement does not identify the person to whom Sanchez Ramos rendered criminal assistance and, because there were numerous gang members involved in the incident

[5] A third scenario is that Owen was principally liable for murdering Nelson by a severe "pistol whipping" and that Sanchez Ramos was guilty as an accomplice for shooting Nelson, despite his ultimately fatal head injuries. Owen was the leader of the Spanaway Crips and Sanchez Ramos arguably shot Nelson under Owen's orders. Even so, we disregard this scenario in light of the medical examiner's statements and Sanchez Ramos's admission that he "sho[]t and kill[ed] Clifton Nelson." CP at 25.

resulting in Nelson's death, the record does not clearly indicate that this person could only have been Owen.

The State argues that the plea language and the medical examiner's statements demonstrate that Sanchez Ramos assisted Owen's separate act of murdering Nelson by "pistol whipping" him. But "[t]here is no separate crime of being an accomplice; accomplice liability is principal liability." *State v. Toomey*, 38 Wn. App. 831, 840, 690 P.2d 1175 (1984). Therefore, Sanchez Ramos need not have specified whether Owen was an accomplice. The record simply does not reveal the crimes to which Owen pleaded; nor does the record reveal the crimes the State charged Owen or other gang members with or what convictions arose out of this incident. At Sanchez Ramos's sentencing hearing, the prosecutor remarked, "It will be 15 minutes before Mr. Owen is brought down," suggesting that Owen pleaded guilty to one or more crimes following Sanchez Ramos's plea. Report of Proceedings (Apr. 25, 2008) at 10.

If Sanchez Ramos rendered criminal assistance to Owen, who may have been convicted of committing murder as a principal by severely "pistol whipping" Nelson, or rendered criminal assistance to others involved in beating Nelson, then Sanchez Ramos's offenses may not be identical in fact. *See* WPIC 120.11. But if Sanchez Ramos rendered criminal assistance to Owen who committed first degree murder as an accomplice to Sanchez Ramos's shooting Nelson, then Sanchez Ramos's convictions may be the same in law and in fact because all the evidence used to prove his first degree murder conviction would necessarily prove that he rendered criminal assistance to Owen as his own accomplice, thus violating the "same evidence" test. *See* WPIC 120.11.

Based on the record before us, we affirm Sanchez Ramos's convictions because the

double jeopardy violation following a guilty plea must be clear from the record presented on appeal or it is waived. *Knight*, 162 Wn.2d at 811-12. Any additional evidence shedding light on the facts necessary to review Sanchez Ramos's claim of double jeopardy must await a proper and timely personal restraint petition supplementing the record to demonstrate the specific crime to which the other person referred to in Sanchez Ramos's plea was convicted and its factual basis.[6]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C. J.

We concur:

Houghton, J.

Quinn-Brintnall, J.

[6] We consolidated Sanchez Ramos's appeal with Owen's appeal under RAP 3.3(b); however, when we notified counsel of the consolidation, counsel advised that it would dismiss Owen's appeal. A stipulation dismissing Owen's appeal was filed on December 11, 2009.